Office - Supreme Court, U
FILED
OCT 15 1984
ALEXANDER L. STEVA
CLERK

No. 83-2014 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1984

GUIDO FREZZO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JOHN F. DE PUE
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

16 pp

QUESTION PRESENTED

Whether the district judge should have recused himself from presiding at petitioner's trial because the judge had sentenced petitioner for a prior offense four years earlier, at which time the judge had read a presentence report concerning petitioner.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statute and rule involved 1

Statement 2

Argument 5

Conclusion 9

TABLE OF AUTHORITIES

Cases:

Gregg v. *United States*, 394 U.S. 489 ..... 4, 5

Smith v. *United States*, 360 F.2d 590 7

United States v. *Bunch*, 730 F.2d 517 ..... 7, 8

United States v. *Carmichael*, 726 F.2d 158 8

United States v. *Clark*, 605 F.2d 939 7

United States v. *Foddrell*, 523 F.2d 86, cert. denied, 423 U.S. 950 7

United States v. *Frezzo Bros.*, 461 F. Supp. 266, aff'd, 602 F.2d 1123 3

United States v. *Grinnell Corp.*, 384 U.S. 563 ..... 7, 8

United States v. *Harris*, 542 F.2d 1283, cert. denied, 430 U.S. 934 7

United States v. *Kelley*, 712 F.2d 884 7

United States v. *Lyon*, 588 F.2d 581, cert. denied, 441 U.S. 910 7

Page

Cases—Continued:

United States v. *Martorano*, 620 F.2d 912, cert. denied, 449 U.S. 952 8

United States v. *Montecalvo*, 545 F.2d 684 7

United States v. *Nelson*, 718 F.2d 315 ..... 7, 8

United States v. *Phillips*, 664 F.2d 971, cert. denied, 457 U.S. 1136 8

United States v. *Small*, 472 F.2d 818 ..... 4, 7, 8

United States v. *Sonderup*, 639 F.2d 294, cert. denied, 452 U.S. 920 7

Webster v. *United States*, 330 F. Supp. 1080 6

Statutes and rules:

Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.* :

33 U.S.C. 1311(a) 3

33 U.S.C. 1319(c) 3

18 U.S.C. 371 2

18 U.S.C. 2315 2

28 U.S.C. 455(a) 1, 3, 4, 7, 8

Page

Statutes and rules—Continued:

Fed. R. Crim. P. :

Rule 32(c) 7, 8

Rule 32(c)(1) 2, 4, 5, 6

Rule 32 advisory committee note (1974) 6

7th Cir. R. 18 7

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-2014

GUIDO FREZZO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is unreported. The opinion of the district court (Pet. App. 5a-16a) is reported at 563 F. Supp. 592.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1984. The petition for a writ of certiorari was filed on June 5, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND RULE INVOLVED

1. 28 U.S.C. 455(a) provides:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceedings in which his impartiality might reasonably be questioned.

2. Fed. R. Crim. P. 32(c)(1) provides:

> The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless, with the permission of the court, the defendant waives a presentence investigation and report, or the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing discretion, and the court explains this finding on the record.
>
> The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolo contendere or has been found guilty, except that a judge may, with the written consent of the defendant, inspect a presentence report at any time.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of conspiracy to transport and receive stolen property in interstate commerce, in violation of 18 U.S.C. 371, and of receiving stolen property that had been transported in interstate commerce, in violation of 18 U.S.C. 2315. He was sentenced to five years' imprisonment and a $10,000 fine on the conspiracy count, and five years' probation and a $10,000 fine on the receipt of stolen property count. The court of appeals affirmed (Pet. App. 1a-4a).

1. The evidence showed that in March 1982, co-defendants Francis Matherly and William Porter stole fifteen paintings, valued at approximately $626,000, from the Pennsylvania home of Andrew Wyeth, the artist (C.A. App.

205-208, 221-226, 272-274).[1] In June 1982, petitioner agreed to purchase several of the stolen paintings from Matherly and co-defendant Benedict LaCorte in exchange for an automobile and $2,000 in cash (C.A. App. 287-288). The paintings were first transported to Matherly's house in Delaware, and then delivered to petitioner by LaCorte, who placed the paintings in petitioner's attic and received payment of $2,000 (C.A. App. 471-472). LaCorte subsequently took the paintings back from petitioner and resold them to co-defendant Douglas Fuller (C.A. App. 476-479). The existence of the conspiracy was discovered following Matherly's arrest on local charges in July 1982. Petitioner was implicated in the scheme when he admitted during a recorded conversation with Matherly's wife that he had purchased three of the stolen paintings from Matherly (C.A. App. 646-651).

2. District Judge Raymond J. Broderick was assigned by random selection to preside at petitioner's jury trial (Pet.3). Previously, in December 1978, Judge Broderick had presided at a jury trial in which petitioner was found guilty of violating the Federal Water Pollution Control Act, 33 U.S.C. 1311(a), 1319(c) (Pet. App. 6a).[2] After reviewing the presentence report concerning petitioner, Judge Broderick had sentenced him to 30 days' imprisonment and imposed a fine (*ibid.*).

Prior to trial in the instant case, petitioner filed a motion requesting that Judge Broderick recuse himself from presiding over petitioner's trial pursuant to 28 U.S.C. 455(a). Petitioner argued that, because Judge Broderick had read

---

[1]"C.A. App." refers to the appendix in the court of appeals. Our citations to the appendix are based upon those contained in the government's brief in that court.

[2]See *United States* v. *Frezzo Bros.*, 461 F. Supp. 266 (E.D. Pa. 1978), aff'd, 602 F.2d 1123 (3d Cir. 1979).

the presentence report in the earlier case, his impartiality might reasonably be questioned. In addition, petitioner contended that language in *Gregg* v. *United States*, 394 U.S. 489 (1969), concerning the general prohibition in Fed. R. Crim. P. 32(c)(1) against disclosure of a presentence report to a trial judge prior to entry of a guilty plea or the return of a guilty verdict, required recusal here.

Judge Broderick denied the motion (Pet. App. 5a-16a). At the outset, the judge asserted that he had no recollection of any prejudicial material in the presentence report (Pet. App. 6a-7a). Relying on *United States* v. *Small*, 472 F.2d 818 (3d Cir. 1972), the judge held that this Court's decision in *Gregg* and Fed. R. Crim. P. 32(c)(1) are both inapplicable to cases where the trial judge has properly read a presentence report involving the same defendant in connection with an earlier case (Pet. App. 7a-9a, 11a-14a). Applying the balancing analysis articulated in *Small* (472 F.2d at 822) for determining whether recusal is appropriate in such cases, Judge Broderick found that there was no possibility of prejudice here because, unlike the situation involving retrial of a defendant on the same charges, there was no danger that the judge's having read a presentence report in a different case would have exposed him to facts adverse to petitioner concerning the instant charges (Pet. App. 9a). Furthermore, the judge noted that it was not reasonable to believe that he would recollect any unfavorable information that might have been contained in the report, which he had read more than four years earlier (*ibid.*).

The district judge concluded that because there was no appearance of partiality here, he was not required to recuse himself under 28 U.S.C. 455(a) (Pet. App. 14a). Judge Broderick also pointed out that most courts that have considered recusal motions under Section 455(a) "have held that the determination whether a judge's impartiality might reasonably be questioned is to be made solely on the basis of

conduct extrajudicial in nature," and, even where conduct in a judicial context has been considered, recusal has been required only in " 'exceptional circumstances' " — not present here — "where the conduct reflects pervasive bias and prejudice" (Pet. App. 14a-15a).

Finally, the judge noted that the administrative and other burdens of transferring this particular case to another judge would be considerable (Pet. App. 10a), and that, as a general matter, "[s]evere burdens would be placed on the judicial system if a judge had to withdraw from a case whenever he or she had presided over proceedings in the same or a related case that provided non-evidentiary information about a defendant" (*id.* at 11a).

3. In affirming petitioner's convictions, the court of appeals held that Judge Broderick had "properly balanced competing considerations" in denying petitioner's recusal motion, and it noted that petitioner had pointed "to no prejudice resulting from [Judge Broderick's] exposure to the presentence investigation report [at the earlier] trial" (Pet. App. 3a).

ARGUMENT

Relying upon this Court's statement in *Gregg* v. *United States*, 394 U.S. at 491-492, that a presentence report "must not, under any circumstances, be 'submitted to the court' before the defendant pleads guilty or is convicted," petitioner contends (Pet. 6-11) that Fed. R. Crim. P. 32(c)(1) requires recusal of the trial judge whenever he has read a presentence report involving the same defendant in connection with prior proceedings. As the district court pointed out (Pet. App. 8a, 14a), *Gregg* is plainly inapposite. There, the Court addressed the propriety of the trial judge's reading the presentence report concerning the charges for which the defendant was on trial prior to entry of the verdict. This case presents the very different question whether it is

permissible for the judge to preside at a trial after having examined a presentence report concerning the defendant in an earlier, unrelated proceeding.

Indeed, the 1974 advisory committee note concerning Rule 32(c)(1) makes it plain that prior exposure to a presentence report in an earlier case does not require the trial judge to disqualify himself. The note expressly states that "[t]here are instances involving prior convictions where a judge may have seen a presentence report, yet can properly try a case on a plea of not guilty." To illustrate this point, the note cites with approval *Webster* v. *United States*, 330 F. Supp. 1080, 1088 (E.D. Va. 1971), where the court held that a district judge was not compelled to recuse himself from conducting a bench trial after having read a presentence report concerning the defendant in connection with sentencing the defendant in another case.

As the district judge observed in this case (Pet. App. 11a-13a), the courts of appeals that have addressed the question are in agreement that Rule 32(c)(1) does not require a trial judge to disqualify himself from presiding at a trial simply because he has read a presentence report involving the defendant in connection with earlier proceedings. As two courts have explained:

> The receipt by a trial judge of a presentence investigation report, in a manner not prohibited by Rule 32(c)(1), does not disqualify him from hearing evidence on a reopening of a trial. To suggest otherwise would suggest also that he thereby renders himself incompetent to hear a retrial of the same case, should he be reversed on appeal. It would suggest also that, thereafter, the Court would be disqualified to try the same defendant on other offenses. That would be highly untenable in light of the decisions that a trial judge, who is familiar with the defendant's background by

> reason of having tried him in previous cases, is not thereby disqualified to try the same defendant in subsequent cases.

United States v. *Clark*, 605 F.2d 939, 941 (5th Cir. 1979), quoting *Smith* v. *United States*, 360 F.2d 590, 592 (5th Cir. 1966). See, *e.g.*, *United States* v. *Bunch*, 730 F.2d 517, 518-519 (7th Cir. 1984) (Fed. R. Crim. P. 32(c) does not require a trial judge to disqualify himself from presiding at the defendant's trial after reading a presentence report in connection with a tentative guilty plea agreement); *United States* v. *Sonderup*, 639 F.2d 294, 296-297 (5th Cir.), cert. denied, 452 U.S. 920 (1981) (same); *United States* v. *Montecalvo*, 545 F.2d 684 (9th Cir. 1976) (presentence report read in connection with subsequently aborted plea of guilty); *United States* v. *Harris*, 542 F.2d 1283, 1303-1304 (7th Cir. 1976), cert. denied, 430 U.S. 934 (1977) (presentence report read in connection with prior conviction on other charges);[3] *United States* v. *Foddrell*, 523 F.2d 86, 87 (2d Cir.), cert. denied, 423 U.S. 950 (1975) (same); *United States* v. *Small*, 472 F.2d at 820-822 (same).

Nor does 28 U.S.C. 455(a), which requires a trial judge's disqualification "in any proceeding in which his impartiality might reasonably be questioned," support petitioner's

---

[3]Rule 18 of the Rules of the United States Court of Appeals for the Seventh Circuit, cited by petitioner (Pet. 5, 8), does not compel a result different from that court's decision in *Harris* or from the other authorities on which we rely. It merely provides, as a matter of local procedure, that when the court of appeals remands a case for a new trial, the case normally will be reassigned to a new district judge. Such a requirement is plainly not mandated by principles of law governing judicial disqualification. See, *e.g.*, *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966); *United States* v. *Nelson*, 718 F.2d 315, 321 (9th Cir. 1983); *United States* v. *Kelley*, 712 F.2d 884, 890 (1st Cir. 1983); *United States* v. *Lyon*, 588 F.2d 581, 582-583 (8th Cir. 1978), cert. denied, 441 U.S. 910 (1979).

claim that Judge Broderick should have disqualified himself in this case. That statute contemplates "personal, extrajudicial bias or the appearance of partiality arising out of such bias." *United States* v. *Phillips*, 664 F.2d 971, 1002 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982). It does not extend to claims of partiality resulting from information acquired during the course of judicial proceedings. *Id.* at 1002-1003. See *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966); *United States* v. *Carmichael*, 726 F.2d 158, 160-161 (4th Cir. 1984); *United States* v. *Nelson*, 718 F.2d 315, 321 (9th Cir. 1983).

Furthermore, Judge Broderick asserted that he had no actual recollection of the contents of petitioner's earlier presentence report, and petitioner has not shown that it would be reasonable to conclude that a judge in Judge Broderick's position would have such a recollection or would appear to be biased against petitioner even if he had such a recollection. There is therefore no reason why "a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *United States* v. *Nelson*, 718 F.2d at 321. See *United States* v. *Martorano*, 620 F.2d 912, 919 (1st Cir.), cert. denied, 449 U.S. 952 (1980).[4]

---

[4]Petitioner also argues (Pet. 11-12) that, even if Fed. R. Crim. P. 32(c) and 28 U.S.C. 455(a) did not require Judge Broderick to recuse himself, application of the court of appeals' balancing approach articulated in *United States* v. *Small*, *supra*, should nonetheless have resulted in the judge's disqualification. The fact-bound question whether the law of the circuit concerning an essentially procedural matter was properly applied in a particular case plainly does not warrant further review by this Court. Moreover, in cases where disqualification is not absolutely required, district judges have broad discretion in ruling on recusal motions, particularly where the motion is based upon the judge's prior exposure to the defendant in a judicial context, such as review of a presentence report. See *United States* v. *Bunch*, 730 F.2d at 519 n.3. Here, because there is no basis for questioning Judge Broderick's assertion that he had no recollection of the contents of the four-year old

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JOHN F. DE PUE
Attorney

OCTOBER 1984

---

presentence report, prepared in connection with unrelated charges, the judge plainly did not abuse his discretion in finding that reasons of judicial economy militated against his disqualification.